Supreme Court, U.S.
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No. 92-1439

In The

SUPREME COURT OF THE UNITED STATES

October Term 1992

HAROLD LAYTON,

Petitioner

v.

GARRARD COUNTY FISCAL COURT,
and RAY HAMMONDS, Judge-Executive
and ARNETT METCALFE, County Treasurer,

Respondents

On Petition For A Writ Of Certiorari
To The Commonwealth Of Kentucky
Court Of Appeals

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I.

Whether *Rutan v. Republican Party of Illinois*, 497 US 62 (1990), permits political affiliation as a consideration of an appointing authority regarding a confidential and constitutionally term-limited office like that of a county treasurer and tax administrator.

II.

Whether petitioner is limited on appeal to that issue determined at summary trial as to the nature of the office of county treasurer and tax administrator following his own motion for summary judgement.

III.

Whether jurisdiction in the Court is foreclosed by the separation of powers doctrine as to offices and officers like that in the instant case.

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BRIEF IN OPPOSITION

May It Please the Court:

Respondents respectfully request that the petition for writ of certiorari to review the judgement and opinion of the Commonwealth of Kentucky Court of Appeals, entered in the above-styled matter on May 1, 1992, be denied.

JURISDICTION

Respondents submit there is no jurisdiction in the United States Supreme Court.

The Court speaks unequivocally regarding the issues upon which writ is sought. *Rutan*, *Branti* and *Finkel* are not offended by the holding of the Kentucky Court of Appeals. Rather, the holding specifically affirms those decisions, giving due regard to both letter and spirit of the fact sensitive analysis and reasoning upon which this Court relied. Petitioner quite literally states no valid claim for which relief may be granted. FRCP 12(b)(2).

Likewise, the separation of powers doctrine commands particular consideration. The Kentucky Court of Appeals, ruling the office of county treasurer and occupational tax administrator to embrace concepts of confidence, discretion, authority and involvement in development of fiscal policy, distinctly held the office to be one for which political affiliation may be contemplated by the appointing authority. Such holding in light of *Rutan* and its precedents forbids the intervention of courts into a province reserved for political questions and those who resolve them. *Baker v. Carr*, 369 U.S. 186 (1962). Thus, respondents urge denial and dismissal of the petition pursuant to FRCP 12(b)(2) and FRCP 12(b)(6).

PRINCIPAL STATE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Kentucky Constitution §23

> The General Assembly shall not grant any title of nobility or hereditary distinction, nor create any office, the appointment of which shall be for a longer time than a term of years.

Kentucky Constitution §107

> The General Assembly may provide for the election or appointment for a term not exceeding four years of such other county or district ministerial and executive officers as may from time to time be necessary.

Kentucky Revised Statute 68.010

County treasurer; appointment, term, oath, bond, removal, vacancy

(1) The fiscal court of each county, at its regular June terms every four (4) years, beginning with June, 1982, shall appoint a county treasurer for a term of four (4) years. If for any reason the county treasurer is not appointed at the June term, the county judge/executive shall call the fiscal court to meet immediately after the adjournment of the term on a day fixed by order entered on the order book of the court, and the meeting shall be held within two (2) weeks after the adjournment of the June term.

(2) The county treasurer shall take office on the July 1st immediately following appointment.

(3) No person is eligible to be county treasurer unless at the time of his appointment he is a citizen of Kentucky, at least twenty-five (25) years old, and has been for the two (2) years next preceding his appointment a resident of the county for which he is appointed. The county treasurer shall take the constitutional oath of office before the fiscal court, and shall execute bond with at least two (2) good sureties, to be approved by the fiscal court. The fiscal court may pay the premium on the bond from county funds.

(4) The fiscal court may remove the county treasurer at any time for neglect of duty, incompetency or dishonesty.

(5) In the case of a vacancy from any cause in the office of county treasurer, the county judge/executive shall call a special term of the fiscal court to fill the vacancy.

(6) The county treasurer holding office on April 2, 1982 shall serve until his successor is appointment and qualified.

Kentucky Revised Statute 68.020

County treasurer; duties and powers

(1) The county treasurer shall receive and receipt for all money due the county from its collecting officers or from any person whose duty is to pay money into the county treasury, and shall disburse such money in such manner and for such purpose as may be authorized by appropriate authority of the fiscal court. He shall not disburse any money received by him for any purpose other than that for which it was collected and paid over to him, and when he pays out money he shall take a receipt therefor. All warrants for the payment of funds from the county treasury shall be co-signed by the county treasurer and the county judge/executive.

(2) He may, and when directed by the fiscal court shall, invest the funds of the county pursuant to KRS 66.480.

(3) He may, and when directed by the fiscal court shall, institute actions in the name of the county against all delinquent sheriffs or collectors of the county, and against anyone having money belonging to the county who fails or refuses to pay it over on demand when due. He shall keep a record of all actions he is directed to institute on behalf of the county, showing their condition and the money collected thereunder.

(4) He shall keep an accurate detailed account of all money received and disbursed by him for the county, and shall keep books of accounts of the financial transactions of the county in the manner required by the uniform system of accounting prescribed by the state local finance officer.

(5) The county treasurer shall, when required by the fiscal court, settle his accounts as county treasurer, and within thirty (30) days after the close of each fiscal year, he shall, unless his immediate predecessor has done so, make a full and complete settlement for the preceding fiscal year with the fiscal court or with a person or persons whom the fiscal court, by order of record, appoints to make settlement with him. In case of a vacancy, the county judge/executive shall call a special meeting which shall proceed in the manner it deems proper to settle the accounts of the county treasurer.

COUNTERSTATEMENT OF THE CASE

I. BACKGROUND

On January 4, 1990 the Garrard Fiscal Court selected, with none dissenting, Arnett Metcalfe to serve as county treasurer of Garrard County effective July 1, 1990. In its February term 1990, respondent fiscal court reimposed an occupational tax abolished in its June term 1989 following the May primary. The fiscal court customarily vested the same individual with the offices of county treasurer and occupational tax administrator. Reconsidering its January resolution at petitioner's request during the fiscal court's June term 1990, the county attorney was directed to notify petitioner that his appointment expired June 30, 1990 consistent with the January resolution effective July 1, 1990. At no time following the inauguration of the present fiscal court was petitioner ever reappointed to any county office. Instead, he served in both offices till July 1, 1990, at which time his successor assumed office. Contrary to petitioner's allegations, respondent fiscal court did not violate any laws in appointing the new treasurer and tax administrator. The January resolution was effective July 1, 1990 and petitioner served his full term.

Summary judgement for petitioner was granted November 17, 1990, with a more specific order entered December 17, 1990. (Petitioner's Appendix 11a-14a) Upon respondents' motion for a new trial and alteration of the judgement, petitioner requested the court restore him to part-time status in the offices he once occupied. In response, the circuit court restored petitioner to a part-time position regarding both offices in violation of KRS 67.080(1)(f). Effectively, the

new judgement limited respondent fiscal court to offices of part-time status regardless of the duties of office and demands and resources of Garrard County. Respondents maintained throughout that the circuit court possessed no subject matter jurisdiction over political appointments consistent with Kentucky Rule of Civil Procedure 12 and could not prescribe the nature and duties of fiscal offices pursuant to KRS 67.083 and 67.080(1)(f). Respondents alleged the constitutionality of KRS 68.010, KRS 68.020 and §§23 and 107 of Kentucky Constitution.

Petitioner maintains that deception by respondent judge-executive enabled the appointment of respondent Arnett Metcalfe. Petitioner further alleges a retributive motive on the part of the judge-executive accomplished Metcalfe's succession. Yet the vote authorizing Metcalfe's appointment was unanimous. (four in favor and one abstention; Kentucky precedent finds that an abstention counts with the majority in a fiscal court ballot. *Lawrence County Fiscal Court v. Lawrence County* Ky., 229 SW 138 (1921). Likewise, a clear distinction exists between a county judge-executive and a county magistrate. The judge-executive is charged with, among other duties, responsibility for the day to day operations of the county and its agencies and, by virtue of office, agency heads. KRS 67.710. A magistrate exercises no control and operates as a legislator. No executive function obtains. KRS 67.040 and 67.078)

II. Kentucky Litigation

Summary judgement for petitioner entered December 17, 1990 was reversed by the Kentucky Court of Appeals on May 1, 1992. The court found the office of county treasurer and occupational tax administrator to occupy a high-level in county

affairs. Embracing attributes of confidence, discretion, authority and involvement in the development of fiscal policy, the Court of Appeals held the office is one of "import and vital function." (Petitioner's Appendix 7a). Nor lightly did the appellate court consider the legislative scheme of KRS 68.010 and 68.020 giving effect to the purpose and intent of Kentucky Constitution §§23 and 107. Candidly, the court stated that federal decisions do not mandate that respondent fiscal court reappoint petitioner, by reason of "preference" or otherwise, to the office of county treasurer upon the expiration of the four-year term. On June 12, 1992 the Court of Appeals denied petition for rehearing and, on December 9, 1992, the Kentucky Supreme Court denied discretionary review.

REASONS FOR DENYING THE WRIT

I.

***Rutan v. Republican Party of Illinois*, 497 US 62 (1990) and its precedents permit political affiliation as a consideration of an appointing authority regarding a confidential and constitutionally term-limited office like that of a county treasurer and tax administrator.**

§§ 23 and 107 of the present Kentucky Constitution preserve and protect elements of self-government and are made effective, in part, through KRS 68. 010 and 68.020.

KRS 68.010(1) decrees that a county treasurer shall be appointed by the fiscal court once every four years during the court's June term. As a fiscal officer of the county his or her term is coextensive with the fiscal year. In no case, however,

may a county treasurer remain in office beyond four years without reappointment. OAG 83-475; OAG 79-490.

Patently, the General Assembly created offices both elective and appointive, the tenure of which cannot exceed a term of years, specifically four. In part this legislative and constitutional scheme prevents perpetual office-holding by a handful of appointees who would otherwise be insulated from and insensitive to the demands of elected officials and ultimately the voters. The advancement of a republican democracy relies upon the avoidance of a few controlling in perpetuity a relatively large number of offices. The danger inherent as to significant appointive offices is that the appointees may frustrate the will of duly elected officials without accountability to the people and likewise prevent entry into government of groups historically denied participation at levels affecting policy. Terms of office are limited whether ministerial or executive. Kentucky Constitution §107. These limits, in combination with duties discrete, confidential and authoritative, are compelling and permit and produce the intended result of officeholders having no greater claim to office than the nearest election.

Augmenting the democratic process are First Amendment protections, ensuring the speech of government employees, even those hostile to superior officeholders, may not be conditioned in unconstitutional ways. Thus, the freedom to act and speak is not absolute, but is limited or qualified by the power of the state within reasonable limits to advance the interests of society consistent with compelling equities. *Potter v. Murray City,* 585 F. Supp. 1126, 1137 (D. Utah 1984), affirmed as modified, 760 F.2d 1065. Though a constitutionally recognized fundamental right is to be carefully guarded, it is not

unqualified. *Planned Parenthood of Rhode Island v. Board of Medical Review,* 598 F.Supp 625, 629 (D. R.I. 1984). Thus speech may be limited, but those limits must be narrowly drawn to advance compelling state interests. *Federal Election Commission v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 256 (1986).

The compelling state interest indicated by the Kentucky Constitution §§23 and 107 and KRS 68.010 and 68.020 is the right of a legislative body (a fiscal court) to select a fiscal officer who will execute its mandates and promote its agenda in letter and spirit. Put another way, "government has a significant interest in ensuring that it has effective and efficient employees." *Elrod v. Burns,* 427 U.S. 347, 365-366 (1976). A government's interest in securing employees who will loyally implement its policies can be accomplished by choosing or dismissing certain high-level or confidential employees on the basis of their political view. *Elrod,* at 365-368.

As defined within the *Rutan* line, an office, as distinguished from an employment, involves a delegation of express sovereign power or function of government to the officer. Public office thus implies legitimate authority to exercise discretion in administering duties and advancing the agenda of government. Manner of creation also sets a public office apart from mere employment. The former is created by constitutional or statutory authority and obliges the officeholder to fidelity, discretion and confidence both as to the appointing authority and the performance mandated. The latter is a function of contract and limits performance to duties routine, prescribed, subordinate and likewise removed from decisionmaking of a magnitude affecting policy. *Lasher v.*

Commonwealth, Ky., 418 SW2d 416, 417 (1967); *see also Howard v. Saylor*, Ky., 204 SW2d 815, 817 (1947)

No First Amendment cry is audible under these facts. An appointive officer, like that in the instant matter, cannot claim, in a republic such as this, that he maintains some vested right in a post subject to a term of years. Public offices are not hereditaments; they are agencies. They are created for the benefit of the public and are not granted for the incumbent. Given the potential and confidential nature of the office of county treasurer and occupational tax administrator no right attaches converting the office from appointive to bureaucratic. *Elrod*, at 365-366.

It is not the previous or even present role assumed by the treasurer in Garrard County which is at issue, but the potential of the office authorized by statutes. *Williams v. City of River Rouge*, 909 F.2d 151, 154 (6th Cir. 1990); *Charron v. Balogh*, 855 F.2d 356 (6th Cir. 1988); *Meeks v. Grimes*, 779 F.2d 417, 419 (6th Cir. 1985).

The dual appointment of petitioner to the office of occupational tax administrator and office of county treasurer, wholly consistent with KRS 68.010, 68.020, 67.080 and 67.083, enhances both the actual and potential nature of the treasurer's role and diminishes petitioner's claim that the statutes demand a cipher instead of an executive. Petitioner ignores his custody of public monies, budgetary responsibilities and the trust and confidence reposed in him. He eschewed the fact that no payment instrument could issue without his counter-signature. Yet, KRS 68.020(1) directs the county treasurer to receive and disburse monies payable to and from the county. Inherent in

this provision is discretion and responsibility to exercise judgement.

KRS 68.020(2) mandates the county treasurer to invest public monies. Though prescribed, implied is the obligation to recommend what types of investment would serve the short and long-term interests of the county. Concurrent with the foregoing obligation, the county treasurer selects or assists in the selection of financial institutions to serve as depositories of public funds and county owned securities. Moreover, the fiscal court cannot compel the payment of a claim if the county treasurer demurs. When placed on notice that the validity of a payable is suspect he may, if he chooses, decline a fiscal court order and await mandamus. *Cain v. Burroughs Adding Machine Co.*, Ky., 203 SW 315 (1918); *Harrison v. Logan County,* Ky., 110 SW 377 (1908); 1958 OAG 41,886.

KRS 68.020(2) further provides that the county treasurer shall invest public monies consistent with KRS 66.480. Express is the obligation to recommend what types of investment would serve the short and long-term interests of the county. KRS 66.480 (1) & (4) vests the county treasurer, upon delegation, with broad authority to select from a diverse range of investments in federal and state securities and institutions. It necessarily follows that both type of investment and maturity fall within the county treasurer's discretion. These are not the powers of an inconsequential employee.

KRS 68.020(3) authorizes the county treasurer, at his own initiative, to bring suit in the county's name to collect accounts payable and delinquent. He may adopt other means short of suit calculated to obtain delinquencies.

KRS 68.020(4) demands the county treasurer maintain a detailed statement of the county's accounts and financial transactions. In Garrard County, as in other Kentucky counties, the county treasurer assists in budget preparation. In this role the treasurer is privy to confidential and sensitive data, particularly tax and revenue information, regardless of whether he or she holds another fiscal office in which this information is routinely obtained. Petitioner is correct that the judge-executive, like any other elected chief-executive, is obligated to annual budget preparation. Yet, petitioner flees from the notion that the agency head who has custody of public monies and a detailed account of same is likewise a discrete, authoritative and confidential officeholder.

Heedless to what potential is embraced by the statutes, petitioner urges that the practice of the fiscal court under which he served is and should be the same for *all* fiscal courts and similar positions in local governments nationwide. Parochial in outlook, petitioner urges the Court to find his and the previous fiscal court's version of the relationship between the county treasurer and occupational tax administrator and fiscal court to be the model for an entire state (and nation as it were). Petitioner pays no deference to the scale, resources, obligations and diverse conditions affecting other counties and their offices.

Comparison reveals the strength of respondents' argument. *Rutan* considered the cases of low-level employees seeking promotion or recall to non-policy-making positions. In short, the parties therein, even if promoted or recalled, would remain low-level employees. Their positions were, respectively, rehabilitation counselor, heavy equipment operator, prison guard, garage worker and dietary manager. In *Branti v. Finkel,*

445 U.S. 508 (1980) the positions at issue were those of assistant public defenders. In *Elrod*, the positions under scrutiny were those of deputy sheriffs. None of the parties held office by virtue of a statute mandating their appointment or constitutional provision limiting their term. Nor did their duties elevate their positions to a nature discrete, confidential and authoritative.

Critical to this analysis is the contrast between the above matters and cases wherein dismissals or failure to reappoint were held permissible. Thus, in *Cordero v. DeJesus-Mendez*, 867 F.2d 1, 13-14 (1st Cir. 1989), the director of finance was dismissed on political grounds, his office being responsible for the city's accounting system and directly reporting to the appointing authority, the mayor. *Bicanic v. McDermott*, 867 F.2d 391 (7th Cir. 1989) and *Charron v. Balogh*, 855 F.2d 356 (6th Cir. 1988), possess similar equities and suggest the same result as to petitioner.

Williams v. City of River Rouge, 909 F.2d at 154, culminates the *Elrod*, *Branti* and *Rutan* lines of cases. Therein a part-time city attorney was held to occupy a post the nature of which permitted appointment and dismissal by a mayor and city council. The Sixth Circuit held his appointment, though merely part-time, vested him with involvement in municipal affairs rising to the level of confidence, discretion and authority. It is potential as well as practice the Sixth Circuit examined. Thus "[t]he relevant focus of analysis is the inherent duties of the position in question not the work actually performed by the person who happens to occupy the office." *Williams*, 909 F.2d at 154; *Meeks v. Grimes*, 779 F.2d at 419; *Ness v. Marshall*, 660 F.2d 517, 522 (3rd Cir. 1981).

The rational ends of appointing those who will faithfully promote the political agenda of confidential public offices satisfy the vital state interest which must be present when a First Amendment right is at issue.

As argument and comparison reveal, petitioner falls well outside that class of individual protected under the First Amendment and its interpretation under the *Rutan* line.

II.

Petitioner is limited on appeal to that issue determined at summary trial as to the nature of the office of county treasurer and tax administrator following his own motion for summary judgement.

From the filing of the complaint to the request for writ, petitioner raises the spectre of malfeasance and manipulation on the part of respondent judge-executive and fiscal court members. Even the trial court which gave petitioner judgement made no findings as to those allegations nor did petitioner assert independent state claims embracing those now inchoate causes. They are barred.

Petitioner alleged at summary trial that his dismissal was the product of patronage; respondents answered affirmatively. The task of the court was then to apply law to stipulation. The "drastic remedy" of summary judgement was invited. *Tomalewski v. State Farm Life Insurance Co.*, 494 F.2d 882, 884 (3d Cir. 1974). The trial court's function was not to arbitrate the accusations of petitioner, since the record was and is absent choate claims of malfeasance or misfeasance, but only to

determine whether any issue of fact existed to be tried. *Ransburg Electro-Coating Corp. v. Landsdale Finishers, Inc.*, 484 F.2d 1037, 1039 (3d. Cir. 1973); *Lockard v. Hoenstine*, 411 F.2d 455, 458 (3d Cir. 1969), *cert. denied* 396 U.S. 941 (1969). Petitioner's claims regarding the bad faith of those appointing one other than himself fail, then, on two obvious grounds. First, the actionable claims, if any, were not brought. These assertions were intended, presumably, to give weight to the *Rutan* claim, not to stand as independent causes. Secondly, where intent is a substantive element of the cause of action (as it would be as to petitioner's fallow assertions), "[t]he principle is particularly apt that courts should not draw factual inferences in favor of the moving party and should not resolve any genuine issues of credibility. *Ness v. Marshall*, 660 F.2d at 519; *Associated Hardware Supply Co. v. Big Wheel Distributing Co.*, 355 F.2d 114, 121 (3d Cir. 1966).

Petitioner fashioned his claim, then sought and obtained summary judgement. He cannot now be heard on more than the law and its application to his and respondents' admission.

III.

Jurisdiction in the courts is foreclosed by the separation of powers doctrine as to offices and officers like that in the instant case.

The issue created by petitioner's cause involves a political question and an attempt by him to encroach on legislative schemes which cannot be arbitrated by a court of law. The authority relied upon by respondents states "[T]he fiscal court may ... establish all appointive offices, set the duties of

those offices, and approve all appointments to these offices...." KRS 67.080(1)(f). Furthermore, the fiscal court is empowered to carry out governmental functions necessary for the operation of the county. KRS 67.083(3). Consistent with statute, the fiscal court is charged with the appointment of a county treasurer, such appointment to be made once every four (4) years. KRS 68.010.

Petitioner asks the Court to ignore the legislative domain of the fiscal court and impose on county government a person its elected assembly spurned. No legislative scheme granted him immunity from the adverse consequences of an election in which his patrons might be defeated. His term as an appointive officer, an officer of considerable confidence and discretion, was nearly coextensive with those whose lease on political office was subject to renewal by the qualified voters of the county. Thus, petitioner concludes that the not quite coextensive term of office proves his case, that political considerations are impermissible. He ignores that continuity between administrations is essential to efficient transfer of authority and public confidence and is, in itself, a rational political end.

This argument neglects that staggered terms for political appointees are not exceptional but by constitutional and statutory mandate present at all levels of county and state government. From the board membership of taxing districts to the boards of university trustees and regents, the racing commission, the lottery commission, and workers compensation board members and administrative law judges, all appointees respond directly to an appointing authority, are selected to promote policy, advise and consult, and enforce laws. When the

authority changes, neither their mandate nor their responsibility is altered. Confidence, authority and discretion repose in their offices till the expiration of their terms. In short, petitioner would upset a legislative scheme with rational and discernible governmental ends consistent with and not violative of constitutional protection. *Wall Distributors, Inc. v. City of Newport News, Virginia*, 782 F.2d 1165 (4th Cir. 1986); *Ocala Kennel Club, Inc. v. Rosenberg*, 725 F. Supp. 1205 (N.D. Fla. 1989). These ends are primary and rooted firmly in the reality of operating a government responsive to the needs of its citizens and the resolutions of its local legislature. *Dickeson v. Quarberg*, 844 F.2d 1435 (10th Cir. 1988); *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251 (7th Cir. 1989).

Applying *Baker v. Carr*, 369 U.S. 186, 217 (1962), the High Court should deny writ as courts are without jurisdiction in political disputes. *Baker* held that prominent on the surface of any case involving a political question is found, disjunctively, a textually demonstrable constitutional commitment to a coordinate political department, a lack of judicially discoverable and manageable standards for resolving it, the impossibility of deciding the issue without an initial policy determination of a kind clearly for non-judicial discretion, the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government, an unusual need for unquestioning adherence to a political decision already made or the potential of embarrassment from multifarious pronouncements by various departments on one question. Upon all these factors and for reasons following, the Court should observe the separation of powers and its own lack of authority to arbitrate this political question.

Petitioner advances claims which are without basis, legally or factually. He claims defects in the statutory scheme by which he was appointed (the dearth of a preference) and the absence of any protection after his patrons' fall from political grace. This Court cannot offer safe harbor. "[Q]uestions about actual origination of legislation or legislative concepts, or adoption of such legislation, and the manner in which defects may be remedied, if at all, are political questions best left to the legislature to resolve." *United States v. Madison*, 712 F. Supp 1379, 1383 (W.D. Wis. 1985). Petitioner seeks intervention of the courts in a matter reserved solely to the local legislature: the selection of its officers.

This Court must properly invoke the political question doctrine and deny writ under facts where the political process provides effective redress for petitioner's complaint: the election of those friendly to his point of view. *Smith v. Reagan* 663 F. Supp 692, 694 (E.D. N.C. 1987). In a political question the Court must apply the separation of powers doctrine when a question is found to involve a textually demonstrable constitutional commitment of the issue to a coordinate political department. *Smith v. Reagan*, 637 F. Supp 964, 966-977 (E.D. N.C.1986); *see also Baker v. Carr*, at 217 (1962). A suit is not justiciable if the case presents political questions. *Apache Bend Apartments, Ltd. v. United States*, 702 F. Supp. 1285, 1290 (N.D. Tex. 1988).

The United States departs from the common law tenet making public offices grantable by the sovereign in which the holder acquired and held an estate. Petitioner's argument that he possesses a preference to reappointment invites comparison and rejection. This archaic common law view is repugnant to

the very institution of our form of government. *Ahearn v. Bailey,* Ariz., 451 P.2d 30 (1969); *State v. District Court*, Mont., 206 P.2d 166, 199 (1949).

The unusual need for adherence to the political decision of the Kentucky General Assembly is manifest. The vital and ancient desire of colonists in the eighteenth century to cast off burdens of class and tyranny ingrained in their successors the same revulsion for lifetime sinecures, especially those whose proximity to government could prove frustrating and effectively render a legislature unresponsive to its citizens. Adherence to the General Assembly's policy under these facts fosters responsive and responsible county officers.

For the Court to reverse the distinct constitutional and statutory obligations, invigorating the political process as to compelling governmental ends, invites contradictory pronouncements on precise and settled questions. It is not merely the office of county treasurer and occupational tax administrator at issue, but rational concepts of terms of office drawn to affect the vitality of purposeful government as to critical positions that cannot simply nor singularly be redefined by this Court nor by coordinate branches without conflict. Writ is indeed inappropriate. Especially since these statutes (KRS 68.010 and 68.020) are already narrowly drawn and gender, race and party neutral, they cannot be more protective of the officeholder's rights without violating a state's right to guarantee meaningful self-government to its localities.

Petitioner finally diminishes the office of occupational tax administrator as to attributes of confidence, discretion, authority and involvement in the development of policy.

Petitioner misrepresents the nature and duties of the occupational tax administrator. He complains the functions of this office are so circumscribed as to render it impotent of any vital function or policymaking imperative. In fact, the occupational tax administrator is vested with significant authority and discretion. The ordinance creating the office speaks decisively to this issue. (Should writ be granted this ordinance shall be printed in its entirety.)

Section IX, paragraph one of the ordinance mandates the Administrator shall "prescribe" forms of all reports required by the act. Paragraph two is equally authoritative:

> Nothing shall prevent or preclude the Administrator from conducting an examination and audit of the books, records, and accounts, as herein provided at any time he may have reasonable grounds to believe that the license has not been correctly reported and paid the license fee due under the provisions of this order.

Paragraph three addresses the confidence reposed in the office in that "[A]ll information obtained by the Administrator or any of his agents or employees ... shall be treated and considered as confidential or privileged ... and shall not be open to inspection by the public."

Paragraph five enlarges the authority that petitioner disdains, to wit: "[I]t is further provided that the Administrator ... shall have the right to disclose to the Commissioner of Revenue of the State of Kentucky ... any of the information protected by Section VIII of this order, provided reciprocal right to information . . . is made available to the County. . . ." All of

these functions are administered at the instance of the officeholder.

Throughout his argument, petitioner denies that political affiliation is a permissible consideration in the selection of the offices at issue. However, in *Sweeney v. Bond,* 669 F.2d 542, 546 (8th Cir. 1982), *cert. denied*, 459 U.S. 878 (1982), the court held fee agents[1] are symbols of the sovereign and that party affiliation is an appropriate requirement for the effective performance of such offices. Still petitioner challenges a process by which he was and remained a beneficiary of patronage himself. For six years, under two successive courts, he fulfilled a role vital in affecting fiscal policy, reflective of the appointing authority's mandate and subject to and in promotion of the political agenda established by the county legislature. In an era where local governments are required to bear an ever increasing share of the fiscal burden, petitioner asserts the chief fiscal appointee of county government is a cipher. To be sure respondents possess a legitimate interest in insuring efficient representation in revenue matters. *Orenstein v. Bond,* 528 F.Supp 513, 519 (E.D. Mo. 1981).

That a political question exists invoking application of the separation of powers doctrine and denying the merit of the petition for writ can be disputed but not defeated under the law and facts of the instant case. As the offices under review embrace concepts which the *Rutan* line excepts from protection so too does the separation of powers analysis foreclose

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[1] Fee agents are individuals authorized by statue to issue motor vehicle licenses and collect motor vehicle use taxes as agents of the Missouri Revenue Department.

jurisdiction consistent with FRCP 12(b)(2) and denial and dismissal consistent with FRCP 12(b)(6).

CONCLUSION

For the foregoing reasons, the petition for writ should be denied and the Kentucky Court of Appeals affirmed.

Respectfully submitted,

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